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Supreme Court, U.S.
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No. 03-1692

IN THE SUPREME COURT OF THE UNITED STATES

JOHN CHARLES BARR,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the Texas Court of Criminal Appeals

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED BY PETITIONER

Does a state prosecutor who withholds evidence favorable to the accused until after the defendant enters a plea of guilty violate the due process clause of the Fifth Amendment as made applicable to the States through the due process clause of the Fourteenth Amendment?

QUESTION REFRAMED BY RESPONDENT

Since *Brady* concerns a defendant's due process right to a "fair trial," may a defendant who pleads guilty and thus waives that right later raise a *Brady* claim regarding possible affirmative-defense–related evidence that was first disclosed at his punishment hearing?

LIST OF PARTIES

The only parties to the proceeding in the court whose judgment is sought to be reviewed are those contained in the caption of the case.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, the State of Texas, respectfully requests this Court to deny the petition for writ of certiorari where the Question Presented concerns the application of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), to a defendant who has pleaded guilty. Briefly, because there is no *Brady* material at issue, this Court need not reach the Question Presented. Further, the Court's decision in *United States v. Ruiz*, 536 U.S. 622, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002), and Texas state law provide sufficient guidance on the Question Presented, so that no compelling reason exists to take up this petition.

JURISDICTION

The Texas Court of Criminal Appeals refused the petitioner's petition for discretionary review on March 24, 2004. The petitioner seeks to invoke the Court's jurisdiction under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

I. Procedural History

At a bench trial, Petitioner John Charles Barr ("Barr")[1] entered a non-negotiated plea of guilty to the second-degree felony offense of aggravated assault with a deadly weapon, namely a firearm. 2 RR 3; CR 76. He had threatened complainant Mark Hixon ("Hixon") with a laser-sighted Glock semiautomatic pistol as he drove alongside Hixon on a highway in Collin County, Texas. 2 RR 3; CR 76. The trial court sentenced him to four years confinement in the state

[1] Respondent State of Texas will be referred to as the "State."

penitentiary. 2 RR 152. Barr's motion for new trial was overruled. CR 3.

Barr appealed his conviction, claiming that the State wrongly withheld evidence that would have supported a defense of self-defense at trial. He argued that *Brady* required pre-trial disclosure of Hixon's statement to the police that he had stepped on his brakes while in front of Barr's fast-approaching vehicle, prior to Barr pointing the gun at him, because that evidence was relevant to a self-defense claim.

The court of appeals affirmed Barr's conviction, finding both that he had waived his *Brady* claim by pleading guilty and that Hixon's police statement was not *Brady* material because his act of stepping on his brakes did not constitute a defense to Barr's subsequent assault. *See John Charles Barr v. State of Texas*, 2003 WL 22412187, No. 11-03-00030-CR (Tex.App.—Eastland, October 23, 2003, pet. ref'd) (not designated for publication) (attached to Petition for Writ of Certiorari as Appendix B). The Texas Court of Criminal Appeals refused Barr's petition for discretionary review, and Barr did not file a motion for rehearing.

II. Facts of the Offense

At the sentencing hearing, Hixon and Barr told two very different versions of the offense, neither supporting Barr's post-trial claim of self-defense.

A. Hixon's Version

Traveling in the right lane of a four-lane highway, Hixon changed lanes in an attempt to pass a slow eighteen-wheeler truck. 2 RR 62. In doing so, he pulled in front of Barr's Jeep. *Id.* When Hixon was even with the eighteen-wheeler, he noticed in his rearview mirror that Barr was "right on [his] bumper." 2 RR 63.

Hixon tapped or stepped on his brakes, and Barr backed off. 2 RR 63, 70, 75, 76-77; CR 114. Hixon passed the eighteen-wheeler and pulled back into the right lane. 2 RR 63; CR 114. Within a few seconds, Barr's Jeep, right window rolled down, pulled up on Barr's left side. 2 RR 63; CR 114-15. Barr looked at Hixon, showed him a semiautomatic pistol with a laser sight, then turned the gun toward Hixon's face and lit up the laser. 2 RR 19-20, 63-64, 73-74, 82. Barr was smiling. 2 RR 65.

Barr pulled into the lane in front of Hixon, and no further confrontation took place. 2 RR 66. Hixon used his cellular telephone to call the police and followed Barr until the police made the stop. 2 RR 66-67, 72-73, 91.

Initially Barr told police he did not have a gun that fit Hixon's description. 2 RR 68, 72, 75. But eventually the police found the weapon in the Jeep, along with a collapsible baton, a set of brass knuckles, two magazines of ammunition, and several bullets. 2 RR 68, 83-84. There was a bullet in the chamber of the gun. 2 RR 83.

B. Barr's Version

Barr denied to the police that he had pointed a gun at Hixon. 2 RR 88. According to Barr, when Hixon pulled in front of him to pass the eighteen-wheeler, a Coke he was drinking spilled on him and on his gun, which was located on the floor of the Jeep's passenger side. 2 RR 18-19, 33. He was wiping the gun off with a towel when he accidentally hit the lever that turns the laser beam on and the laser shined into Hixon's window, glancing off his rearview mirror and bouncing back into Barr's eye. 2 RR 19.

Barr was very upset about that, he said, because he "wasn't actually trying to point the gun at the gentleman." 2 RR 19; *see also* 2 RR 35. He acknowledged that it appeared to Hixon and even to him that he intentionally pointed the gun,

and that is why he pleaded guilty (2 RR 19-20, 21-22), but in fact he "was very sorry, and [he] was just trying to clean . . . the Coke off the gun." 2 RR 20.

III. Additional Facts Relevant to This Petition

In a pretrial discovery motion, Barr requested and the State agreed to provide all evidence favorable to him and material to his guilt or punishment. CR 30. Barr also requested all witness statements, which the State agreed to make available at cross-examination. CR 27.

At the punishment stage of the trial, the State provided Barr with Hixon's written police statement prior to his cross-examination. 2 RR 68, 69; CR 114. Barr did not object to the statement at all, did not ask for a continuance, and did not make any motion to withdraw his guilty plea.

ARGUMENT

I. There is no *Brady* material at issue.

There is no *Brady* material at issue in this case. Barr's claim of *Brady* material is based on critical misstatements regarding the nature of his conduct and Texas's law of self-defense.[2]

A. By claiming that he acted in self-defense, Barr has critically misstated the nature of his conduct.

In Barr's account of the offense in his statement of the case, he notes that Hixon engaged his brakes after he pulled his vehicle in front of Barr's Jeep. He then represents:

> Reacting to the threat caused by Mr. Hixon's vehicle, Dr. Barr slowly pulled a pistol while

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[2] *See* Rules of the Supreme Court of the United States, Rule 15.2 (requiring misstatements to be identified or risk being waived).

> driving past Mr. Hixon, calmly drove past Mr. Hixon's vehicle lowering the gun once the threat subsided and Dr. Barr was safely past Mr. Hixons's vehicle.

Petition for Writ of Certiorari at 3; *see also* Petition for Writ of Certiorari at 19. But there is no evidence in the record that Barr felt a *threat* by Hixon's vehicle, that he pulled the gun on Hixon *slowly,* that he *calmly* drove past Hixon's vehicle, or that the reason he lowered the gun is that he *felt a threat had subsided.* These embellishments to the facts are clearly supplied to coincide with Barr's post-trial claim of self defense. Indeed, Barr's testimony at his sentencing hearing—that he *inadvertently* pointed the gun at Hixon—is antithetical to what he is now representing to this Court. Barr testified:

> And I spilled the Coke, when he cut in front of me, I spilled the Coke on myself and on the Jeep seat, and on the gun. . . .
>
> I reached down and picked up the gun, and I had a rag, a towel in the passenger seat of the Jeep, and I was wiping the Coke off the handgun. And it had a lazer [sic] sight on it. And the lazer sight shined in the front, the window of . . . this man's truck and glanced off his rearview mirror. . . .
>
> I was very upset about it. I wasn't actually trying to point the gun at the gentleman, but I was wiping it off with a towel and must have hit the little lever that turns the lazer beam on.

2 RR 19. Hixon's testimony that Barr was smiling while he pointed a gun at him further belies Barr's current claim that he was feeling threatened. 2 RR 65. Also inconsistent with a claim

of self-defense, when stopped by police Barr denied pointing the gun at Hixon. 2 RR 68, 72, 75, 88.[3]

B. Barr has mischaracterized Texas's law of self-defense.

Throughout the instant petition for writ of certiorari, Barr asserts that the fact that Hixon stepped on his brakes supports a defense of self-defense under Texas law. *See* Petition for Writ of Certiorari at 3, 5, 6, 18, 19. But that is not a fair representation of Texas law. Pointing a loaded, laser-sighted semiautomatic pistol at Hixon was not immediately necessary for Barr's protection. *See* TEX. PENAL CODE § 9.31 (a person is justified in using force when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force). Further, Barr could easily have retreated from any perceived danger with the simple action of slowing his Jeep down and distancing himself from Hixon. *See* TEX. PENAL CODE § 9.32(a)(2) (use of deadly force justified only when retreat is unreasonable). Therefore, under Texas law, Barr's actions would not have constituted self-defense even if he had taken them in response to Hixon's stepping on his brakes.

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[3] Barr also asserts in this petition for writ of certiorari that "[a]t a minimum, counsel for the accused could have used the information [that Hixon engaged his brakes] to lower the punishment assessed during the punishment phase of trial." Petition for Writ of Certiorari at 19. But Barr's counsel had that information during the punishment stage, cross-examined Hixon about it, and referred to it during his closing argument. 2 RR 69-71, 76-77, 147. Thus Barr's claim that he would have received a lesser punishment if the court had considered the information has already been proven false.

Barr also misstates his testimony when he asserts that he entered his plea of guilty because of the State's response to his request for discovery. *See* Petition for Writ of Certiorari at 3, 7, 14. At his punishment hearing, he testified that he pleaded guilty because it appeared from his actions that he had intended to scare Hixon with the gun. 2 RR 19-20, 21-22.

C. Conclusion

Thus, Barr claims there was *Brady* material when there was none. His actions were not defensive. And Texas's law of self-defense does not allow a driver to pull alongside another driver and aim a laser-sighted semiautomatic pistol at him in retaliation for being cut off. Evidence that Hixon stepped on his brakes—the supposed trigger for Barr's actions—was not favorable or material to any valid defense. It was therefore not *Brady* material and was not wrongly withheld.

This Court can thus deny the instant petition for writ of certiorari for the simple reason that there is no *Brady* material at issue. It need not, and should not, reach Barr's Question Presented.

II. Even if the evidence was *Brady* material, current federal and state law sufficiently address the Question Presented.

Even if evidence that Hixon stepped on his brakes was *Brady* material, current federal and state law sufficiently address Barr's Question Presented, whether he waived his *Brady* claim by pleading guilty. This Court's opinion in *United States v. Ruiz*, 536 U.S. 622, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002), guides the federal constitutional analysis. In *Ruiz*, this Court upheld the constitutionality of a "fast track" plea agreement requiring a defendant to waive, *inter alia*, her right to receive impeachment evidence and evidence related to affirmative defenses. *Ruiz*, 536 U.S. at 633, 122 S.Ct. at 2457. As the Court noted, *Brady* recognizes the Constitution's basic "fair trial" guarantee. 536 U.S. at 628, 122 S.Ct. at 2454-55. But when a defendant pleads guilty, as Barr did here, he waives that guarantee. 536 U.S. at 628-29, 122 S.Ct. at 2455.

Although Ruiz challenged the constitutionality of the waiver of *impeachment* evidence, not evidence related to an *affirmative defense*, the Court addressed its opinion to that type

of evidence as well. 536 U.S. at 633, 122 S.Ct. at 2457. And as Justice Thomas stated in his concurring opinion:

> [T]he Constitution does not require the Government to disclose either *affirmative defense* information or impeachment information . . . before entering into a binding plea agreement with a criminal defendant. . . . The principle supporting *Brady* was "avoidance of an *unfair trial* to the accused." . . . That concern is *not implicated at the plea stage* regardless.

Ruiz, 536 U.S. at 633-34, 122 S.Ct. at 2457 (Thomas, J., concurring) (emphasis added; citations to authority omitted). Also, although the guilty plea in *Ruiz* was entered as part of a plea bargain, if *Brady* seeks only to avoid an unfair *trial*, the Court's holding should just as well apply to a guilty plea entered without the benefit of a plea agreement. *Ruiz*, therefore, provides sufficient guidance on the Question Presented.

Barr does not adequately distinguish the holding in *Ruiz*. Rather, he re-presents pre-*Ruiz* arguments—that his plea was involuntary because he did not have the benefit of Hixon's statement (*see* Petition for Writ of Certiorari at 11, 13) and that if *Brady* claims are waived by a guilty plea a prosecutor will have an incentive to withhold *Brady* information until after the plea (*see* Petition for Writ of Certiorari at 15)—that were a part of the Ninth Circuit's opinion in *Ruiz* that was reversed.

Further, under Texas law, a defendant who enters a valid non-negotiated plea of guilty waives the right to appeal a claim of error, including *Brady* error, when the judgment of guilt is rendered independent of, and is not supported by, the error. *See Young v. State*, 8 S.W.3d 656, 666-67 (Tex.Crim.App. 2000); *Ramirez v. State*, 89 S.W.3d 222, 231-32 (Tex.App.—Corpus Christi 2002, no pet.) (applying *Young* to appellant's complaint that State did not produce exculpatory evidence prior to his

plea). In this case, the trial court's judgment of guilt was based on testimonies of Hixon and Barr that Barr pointed his pistol at Hixon. The judgment was wholly independent of the fact that Hixon stepped on his brakes. Therefore, under *Young*, by entering his plea of guilty Barr waived any obligation the State may have had to disclose that fact.

Barr has not presented any compelling reason why, under the facts of his case, this Court should circumscribe *Ruiz* or upend *Young* to grant him the relief he seeks in this petition. *See* Rules of the Supreme Court of the United States, Rule 10 (providing that review on writ of certiorari is not a matter of right, but of judicial discretion, and should be granted only when compelling reasons warrant). This Court should deny this petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, Barr's petition for writ of certiorari should be denied.

Respectfully submitted,

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